Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1700

DR. SCOTT SMART,

Petitioner,

v.

TEXAS POWER & LIGHT COMPANY, et al.,

Respondents.

BRIEF OF TEXAS POWER & LIGHT COMPANY, ET AL., RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents pray this Honorable Court to deny the Petition for a Writ of Certiorari for the reason that the judgment below is correct, just, and supported by an unbroken legion of decided cases in point, including cases heretofore decided by this Honorable Court.

PREFACE

The Petition for Writ of Certiorari is yet another chapter in a tome of harassing, vexatious and frivolous attempts (first commenced over twenty years ago in 1955) by Petitioner or his

attorney to burden the courts with their disagreement with the philosophy that public service corporations have properly been granted by the State the power to take private property for a public purpose upon the payment of just compensation.

In 1955, plaintiff's attorney, S. L. Lewis, challenged the authority of Texas Power & Light Company, Respondent herein, to survey his land preparatory to its filing a condemnation action. The Texas Court of Civil Appeals affirmed an injunction granted by the trial court restraining Lewis from interfering with the survey. *Lewis v. Texas Power & Light Company,* 276 S.W. 2d 950 (Tex.Civ.App. 1955, error ref'd, n.r.e.).

During the pendency in the state courts of the Lewis condemnation suit, referred to above and involving the same tract of land, S. L. Lewis, on behalf of his sister, brought an action in the United States District Court against Texas Power & Light Company and its parent company challenging the validity of the Texas condemnation laws. The 5th Circuit affirmed the trial court's dismissal of the action. *Baber v. Texas Utilities Company,* et al., 128 F.Supp. 753 (N.D.Tex. 1955), aff'd 5 Cir., 228 F.2d 665 (1956).

In 1972, Petitioner's attorney, S. L. Lewis, instituted an action in the United States District Court against Texas Power & Light Company, its parent and associated companies, and substantially all other electric and gas utility companies in Texas, again attacking the validity of the Texas condemnation laws. The 5th Circuit affirmed the trial court's dismissal of the action. *Lewis v. Texas Power & Light Company, et al.,* 5 Cir. 462 F.2d 1318 (1972).

While the above case, *Lewis v. Texas Power & Light Company,* was pending in the 5th Circuit and before its decision, Lewis filed in the U.S. Supreme Court his petition for Writ of Mandamus and in the alternative for Writ of Certiorari against the Chief Judge of the 5th Circuit and the trial judge, seeking reinstatement of the case on the trial docket. This Court denied the motion. *Lewis v. John R. Brown, Chief Judge, et al.,* 404 U.S. 819, 92 S.Ct. 74, 30 L. Ed. 119 (1971).

In 1972, Don Smart, represented by the same S. L. Lewis who instigated the previous actions, brought suit against Texas Power & Light Company and the Governor and Attorney General of Texas, again alleging the invalidity of the Texas condemnation laws in regard to a condemnation suit filed in Collin County, Texas, in 1970. The action of the trial court in dismissing the action was affirmed by the 5th Circuit. *Don M. Smart v. Texas Power & Light Company, et al,* 5 Cir., 525 F.2d 1209 (1976). From such action, plaintiff has recently petitioned for a Writ of Certiorari from this Court.

Later in 1972, Nancy Gayle Smart, wife of Don Smart, represented by S. L. Lewis, filed an action in the U. S. District Court against the Dallas County Sheriff and his deputies, a Dallas County District Attorney, the Dallas County Criminal Judge and the Rockwall County District Judge in whose Court the 1972 Don Smart condemnation proceeding was pending, alleging false arrest in connection with Smart's allegedly interfering with the service of process in the condemnation proceedings. The 5th Circuit affirmed a judgment against the plaintiff. *Nancy Gayle Smart v. Jones,* 5 Cir., 493 F.2d 663 (1974), reh. den., 5 Cir., 495 F.2d 1372 (1974). This Court denied petition

for Writ of Certiorari, 419 U.S. 1090, 95 S.Ct. 681, 42 L.Ed.2d 882 (1974), and denied petition for rehearing, 420 U.S. 939, 95 S.Ct. 1151, 43 L.Ed.2d 417 (1975).

In 1973, Don Smart, represented by S. L. Lewis, brought a civil rights action in the U.S. District Court against the Dallas County Sheriff and his deputies, the District Attorney and his assistants, and Texas Power & Light Company and its president and its attorney, alleging the invalidity of the Texas condemnation laws and false arrest for allegedly interfering with the service of process upon him in the condemnation suit involved in the instant controversy in which he has petitioned this Court for a Writ of Certiorari. The trial court granted defendant's motion for summary judgment, and upon plaintiff's appeal, the 5th Circuit affirmed. *Don Smart v. Jones, et al*, 5 Cir., 530 F.2d 64 (1976). (Past history indicates that Plaintiff will shortly file a Petition for Writ of Certiorari in that case).

In 1974, Scott Smart, the brother of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against Texas Power & Light Company and its attorney and the District Judge of Collin County, Texas, in which the Don Smart condemnation suit was pending, alleging the invalidity of the Texas condemnation laws and that the Collin County proceedings were void because of his non-joinder as a party. The trial court dismissed the action because of Scott Smart's lack of standing by reason of his claim under a conveyance which was unrecorded until 2½ years after commencement of the Collin County proceedings. The 5th Circuit affirmed the dismissal. *Scott Smart v. Texas Power & Light Company, et al*, 5 Cir., 525

F.2d 1211 (1976). The instant proceeding involves Scott Smart's petition to this Court for a Writ of Certiorari.

Later in 1974, Nancy Gayle Smart, wife of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against Texas Power & Light Company and its president and attorney, alleging the invalidity of the Texas condemnation laws and deprivation of her constitutional rights, said action being based upon the same facts and occurrence as she had alleged in her previous action against the Dallas County Sheriff, et al. Defendants' motion to dismiss this action on the ground of *res judicata* and collateral estoppel is pending in the trial court. *Nancy Gayle Smart v. Texas Power & Light Company, et al*, No. CA3-74-870-F in the U.S. District Court for the Northern District of Texas, Dallas Division.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" is inaccurate and misleading. It is designed to leave the impression that back in 1970 Texas Power & Light Company illegally "took" a power line easement across Petitioner's land without bothering to sue him or pay thim any money. As the opinion of the Court of Appeals in this case states, as well as the Order of Dismissal of the District Court below, the alleged interest of the Petitioner in the property in question was not made known until 1973, two and one-half years after the commencement of condemnation proceedings against Don Smart (Petitioner's brother) and others. (See Opinions in Addendum of Exhibits on file herein).

The Courts below did not reach the constitutional questions

raised by Smart and did not pass upon those questions because Smart had no standing to raise the same.

REASONS FOR DENYING THE WRIT

I

Smart was without standing in the United States District Court to attack the constitutionality of Articles 1435 and 1436 and Articles 3264 through 3267 of the Texas Civil Statutes because no property interest of Smart was or is being sought by exercise of the power of eminent domain. In addition, there are good and sufficient remedies in law and in equity readily available to Smart which he may assert in the United States District Court or in other courts of competent jurisdiction to protect his property rights or seek redress for injuries to same that do not invoke any of the provisions of the Texas statutes noted above.

Texas Power & Light Company neither sought nor seeks any property interest of Smart. It has already secured an easement from all persons who, according to the Deed Records of Collin County, Texas, owned the land in 1970, being the fee owner, Don Smart (Smart's brother), the lienholders and the tenant. The fact that Smart may have acquired an interest in the land in 1973, long after Texas Power & Light Company's electric transmission line had been built over the land, or that for the first time in 1973 he revealed his alleged ownership, is of no consequence.

The facts are these. On September 1, 1970, the Company filed its condemnation suit for an easement for electrical facilities against Don M. Smart (the brother of *Scott Smart*, Petitioner), owner of record title, Eugene Lindsey, Ruby Lindsey and Arlie Lindsey, lienholders, and Dwight Crigger, tenant. On October 29, 1970 the three special commissioners appointed by the County Judge held their hearing and fixed the amount of damages to the land at $34,000 in their award. On or about November 5, 1970, Don M. Smart filed his written objections to the award in which he raised *no* constitutional objections or questions. That suit remains pending in Collin County, Texas, now being in the state district court. It is interesting to note that Don Smart recites in his objections that the other defendants "have assigned all their interest in this litigation to Don M. Smart." The foregoing facts are set forth in the certified copies of court papers attached to the Motion to Dismiss filed in the trial court by Texas Power & Light Company. (R., pp. 150-164)

At the time the suit was filed, record title to the land was solely in the name of *Don* M. Smart, as shown by certified copies of the four original deeds conveying title to "Don M. Smart," all dated in 1969 and all filed for record on January 8, 1970. (R. 371-387) These are the same four deeds, showing the same recording data, as are noted as being corrected in the four "correction" deeds executed in 1973 which are shown as exhibits 7, 8, 9 and 10 in Plaintiff's Request for Admissions filed in the trial court. (R. 20-123)

At the time the condemnation suit was filed, Petitioner *Scott* Smart did not appear as an owner of the property according to the deed records of Collin County. Neither Texas Power & Light Company nor its employees, agents or attorneys were aware of his existence, and there is nothing in the record of this case to indicate otherwise.

Smart seems to be asserting a prior interest in the land and to be imputing knowledge to Texas Power & Light Company of such interest by virtue of the four correction deeds referred to above. As the acknowledgments on the deeds indicate, these deeds were executed and acknowledged in March and April, 1973, and were filed and recorded in April, 1973, two and one-half years after the condemnation suit was filed and two years after Don Smart and the lienholders, on May 31, 1971, withdrew the sum of $34,000 deposited into the registry of the court by Texas Power & Light Company.

The four correction deeds recite that their purpose is to correct legal descriptions, the consideration evidenced by notes, and "to show the legal ownership . . . as of December 31, 1969," the latter language apparently being an *ex post facto* effort to backdate the one-fourth interest of Scott Smart from 1973 to 1969. We call attention to the fact that the words "as of December 31, 1969" were interlined or inserted at some time after the deeds were originally prepared. Plaintiff's Exhibit No. 9 attached to Request for Admission.

It is difficult to believe that Scott Smart did not receive any benefit from the $34,000 deposit which was withdrawn in 1971, either by its application to reduce the indebtedness on the property or more directly through payment to his brother. Under the law of the State of Texas, Don Smart, by drawing down the $34,000, has foreclosed his right to challenge the validity of the proceedings. *State v. Jackson,* 388 S.W.2d 924 (Tex.Sup., 1965); *United States ex rel. T.V.A. Powelson,* 319 U.S. 266, 63 S.Ct. 1074, 87 L.Ed. 1390; *Luby v. City of Dallas,* 396 S.W.2d 192 (Tex.Civ.App. writ ref. n.r.e.). The present

suit by Scott Smart constitutes an indirect effort on his part to do what Don Smart cannot do directly in the various other suits he has filed.

The condemnation suit in Collin County, Texas, is still pending at this time. If Petitioner is correct that he has a justiciable interest in that action, he can intervene in the same and assert his rights—or he may choose to proceed against his brother for money.

In any event under the legal principles established by this Court and under the facts of this case, Petitioner had no standing to bring this suit in a federal district court. A comprehensive discussion of standing, as well as justiciable interest in general, is found in *Flast v. Cohen,* 392 U.S. 83, 20 L.Ed. 947, 88 S.Ct. 1942 (1968).

II

The dismissal of Smart's suit is additionally correct under the doctrine of laches. Smart waited from the institution of condemnation proceedings in 1970 and from construction of the transmission line in 1971 before filing the present action in 1974. At no time prior to 1974 did he challenge Respondent's right to construct its line. (R., pp. 131-135, 151-152) Under these factual circumstances the doctrine of laches is applicable in the case at bar. *Robinson v. Transcontinental Gas Pipe Line Corporation* (D.C.Ga. 1969) 306 F.Supp. 201, 208, aff'd., *Id.,* 5 Cir., 421 F.2d 1397 (1970) cert.den. 398 U.S. 905. *Northern Pacific Railroad Co. v. Smith,* 171 U.S. 260, 271-275, 18 S.Ct. 794, 43 L.Ed. 157, 161-163 (1898); *Lacy v. United States,* 5 Cir., 216 F.2d 223, 225 (1954); and *Dickinson v.*

Brown-Crummer Inv. Co., 10 Cir., 137 F.2d 615, 618 (1943).

Laches provides yet another reason for the denial of the Writ.

III

Because Petitioner cites no authorities bearing upon the validity of the Texas condemnation statutes and whether they meet the tests of due process, we will not do so. In this regard, however, reference is made to arts IV, V and VI of "Respondent Texas Power & Light Company's Brief In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" being filed in the case of *Dr. Don M. Smart v. Texas Power & Light Company, et al*, in which case a Petition for a Writ of Certiorari is now pending in this Court.

CONCLUSION

There is no merit to Petitioner's Petition for Writ of Certiorari, any more than there was any merit to the contentions made in the series of cases described in the Preface, *supra*. The judgments of the courts below are correct and just.

WHEREFORE, Respondents pray this Honorable Court to deny a Writ of Certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Frank M. Ryburn, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing "Brief of Texas Power & Light Company, et al., Respondents, in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" by mailing three copies of same by United States Mail, postage prepaid, on June 17, 1976, to each, Mr. S. L. Lewis, 5614 Richmond Street, Dallas, Texas 75206, counsel of record for Petitioner, and Mr. David R. Thomas, Assistant Attorney General of Texas, 2930 Turtle Creek Plaza, Suite 114, Dallas, Texas 75219, counsel of record for Respondents Hon. Dolph Briscoe and Hon. John Hill.

Frank M. Ryburn, Jr.